REPORTABLE (7)

Judgment No. S.C. 210/98
Civil Appeal No. 635/92

VENIA MAGAYA v NAKAYI SHONHIWA MAGAYA

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA, EBRAHIM JA, MUCHECHETERE JA &
SANDURA JA
HARARE, NOVEMBER 2, 1998 & FEBRUARY 16, 1999

Ms R Makarau, for the appellant

M Mtombeni, for the respondent

W Ncube, Amicus curiae

MUCHECHETERE JA: This is an appeal against the decision of the magistrate, Harare, the effect of which was to appoint the respondent heir to the estate of the late Shonhiwa Lennon Magaya ("the deceased").

The facts in the matter are that the deceased died intestate. He had two wives. The first wife was the mother of the appellant (born in 1941) and the second wife is the mother of the respondent (born in 1946). The first wife had only one child, the appellant, and it appears that the second wife had three children, the respondent and two other sons, namely Frank Shonhiwa Magaya (born in 1942) and Amidio Shonhiwa Magaya (born in 1950). The property in the deceased's estate included house number 767 Old Mabvuku in Harare ("the said house") and some cattle at the communal home.

It is apparent from the above that the appellant is the eldest child of the deceased and is female. The respondent is not the eldest male child of the deceased. He, however, claimed the heirship because the eldest male child, Frank Shonhiwa Magaya, declined to claim the heirship on the ground that he was not able to look after the family.

Soon after the death of the deceased the appellant, with the support of her mother and three other relations, went to claim the heirship of the estate in the community court and it was granted to her. The respondent later discovered this and applied to the community court for the cancellation of the appointment on the ground that he and the other persons interested in the deceased's estate were not summoned to the hearing at which the appellant was appointed heir - failure to comply with the provisions of s 68(2) of the Administration of Estates Act [*Chapter 6:01*] ("the Act").

The appointment was duly cancelled and all interested parties were summoned to and did attend a new hearing on the matter on 14 October 1992. After hearing from the claimants, that is, the appellant and the respondent, and the other interested parties, the learned presiding magistrate awarded the heirship to the respondent. The learned magistrate stated the following in arriving at his decision:-

> "… The first claimant (the respondent) is not the first born son but the first born, Frank, refused to be appointed heir because he is not able to look after the family, this is the view of all members of the family. There are only two contestants, that is, (the respondent) and Venia. Venia is a lady (and) therefore cannot be appointed to (her) father's estate when there is a man." (The underlining is mine).

The provisions of s 68(1) of the Act read as follows:-

> "68 (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged." (The underlining is mine).

It was not in dispute that the deceased was an African who contracted his two marriages according to African law and custom. And it was taken for granted that the deceased belonged to the Shona tribal grouping in Zimbabwe. It was also conceded that the Shona and Ndebele tribal groupings in Zimbabwe have broadly similar customs and usages on succession and inheritance. These, I gather, are similar to many tribal groupings in South Africa.

I therefore agree with what Bennett said at p 126 of his book entitled *Human Rights and African Customary Law Under the South African Constitution*:-

> "In customary law succession is intestate, universal and onerous. Upon the death of a family head his oldest son (if the deceased had more than one wife, it would normally be the oldest son of his first wife) succeeds to the status of the deceased. Emphasis on the term 'status' implies that an heir inherits not only the deceased's property but also his responsibilities, in particular his duty to support surviving family dependants." (The underlining is mine).

See also Goldin and Gelfand's *African Law and Custom in Rhodesia* at p 284 where the authors say:-

> "The principles and practice of rules and customs concerning succession are subject to variation and differences as is all customary law. There are, however, two broadly or generally similar systems, that which prevails among the Shona and secondly among the Ndebele. The most significant difference is that under Shona law a deceased's eldest son is his heir but under Matabele law the heir is the eldest surviving son of the deceased's principal or 'great house'. Each wife establishes a 'house' or independent family and economic unit. Thus if a man has three wives there will be three 'houses' in existence. An Ndebele heir (*indhlalifa*) inherits the family property (*ilifa*) as absolute owner exclusive of the assets of the junior houses. The senior house is known

as '*indhlu 'nkulu*'. The seniority of the houses is not necessarily automatic according to the chronological order of establishment. …

The Shona have no system of ranking of wives for the purpose of inheritance or succession. A Shona heir does not acquire the estate in his individual capacity but as the representative of the deceased. He, therefore, also inherits his father's obligations such as the maintenance of his father's dependants (Child *Tribal Law in Rhodesia* 55)." (The underlining is mine).

What is common and clear from the above is that under the customary law of succession of the above tribes males are preferred to females as heirs. See also *Mhango v France* 1940 SR 100; *Matambo v Matambo* 1969 (2) RLR 154; *Chihowa v Mangwende* 1987 (1) ZLR 228 (S) at pp 230C-231E; *Vareta v Vareta* S-126-90 at p 8 of the cyclostyled judgment; *Moyo v Moyo* 1990 (2) ZLR 81 (S) at 82 C-D; *Antonio v Antonio* 1991 (2) ZLR 42 (S) at 44E; *Mwazozo v Mwazozo* S-121-94 at p 2 of the cyclostyled judgment; *Mudzinganyama v Ndambakuwa* S-50-93; and *Masuku v Zikhali* S-60-95 at p 5 of the cyclostyled judgment.

The said rule which prefers males to females as heirs to the deceaseds' estates constitutes a *prima facie* discrimination against females and could therefore be a *prima facie* breach of the Constitution of Zimbabwe ("the Constitution"). See subss (1) and (2) of s 23 of the Constitution, which read:-

"23 (1) Subject to the provisions of this section -

(a) no law shall make any provision that is discriminatory either of itself or in its effect; and

(b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of

that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudiced -

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;

and the imposition of that condition, restriction, or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned."

However, it seems to me that these provisions do not forbid discrimination based on sex. But even if they did on account of Zimbabwe's adherence to gender equality enshrined in international human rights instruments, there are exceptions to the provisions. The relevant exceptions are contained in subss (3)(a) and (3)(b) of s 23 of the Constitution, which read as follows:-

"23 (3) Nothing contained in any law shall be held to be in contravention of subsection (1)(a) to the extent that the law in question relates to any of the following matters -

(a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;

(b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans where such persons have consented to the application of African customary law in that case; …". (The underlining is mine).

In my understanding of the above provisions, matters involving succession are exempted from the discrimination provisions, firstly because they relate to "devolution of property on death or other matters of personal law", and

secondly in this case because they relate to customary law being applied between Africans. The application of customary law generally is sanctioned under s 89 of the Constitution. That subss (3)(a) and (3)(b) of s 23 of the Constitution exempt customary law from the application of the provisions forbidding discrimination is accepted by Bennett *op cit* at p 22 where, in note 87, he says:-

> "This idea comes from Zimbabwe where, although section 23(1) of the Constitution forbids discrimination, section 23(3)(b) shields customary law from that provision."

I would therefore dismiss the appeal on the grounds that this matter is firstly concerned with devolution of property on death and secondly that it relates to customary law being applied to an estate of an African who married according to African law and custom. In both cases the discriminatory aspects of the law applicable are saved by the exemptions in the Constitution.

There is, however, need to discuss the effect of the Legal Age of Majority Act 1982 (No. 15 of 1982) (now s 15 of the General Law Amendment Act [*Chapter 8:07*]) ("the Majority Act") on customary law. Subsections (1) and (3) of s15 of that Act read:-

> "15 (1) On and after the 10th December, 1982, a person shall attain the legal age of majority on attaining eighteen years of age …
>
> (3) Subsections (1) and (2) shall apply for the purpose of any law, including customary law and, in the absence of a definition or any indication of a contrary intention for the construction of 'full age', 'major', 'majority', 'minor, 'minority' and similar expressions in -
>
> (a) any enactment, whether passed or made before, on or after the 10th December; and

(b) any deed, will or other instrument of whatever nature made on or after that date."

The first opportunity to interpret the above provisions was in the case of *Katekwe v Muchabaiwa* 1984 (2) ZLR 112. This was a seduction damages case brought by the guardian of an unmarried female where sexual intercourse had taken place between the female and the seducer with consent. The purpose of an action of this nature, under customary law, is to compensate the guardian for the loss in the female's potential *lobola* price.

I should say at the outset that, in my view, the Court in that case laboured under what I consider was the wrong view or conclusion that seduction damages under customary law belong to the seduced female. They belong to the guardian. He is the person who charges and receives *lobola*. The action belongs to him in all circumstances and the seduced female does not have the right of action in the matter. When a guardian sued under customary law he did not sue as a representative of the seduced female. He sued in his own capacity because he was the person who had suffered loss - diminution of *lobola*. See Ncube's "The decision in *Katekwe v Muchabaiwa*: A Critique", published in *Zimbabwe Law Review* Vols 1 and 2, 1983-84, p 217 at p 220. Although the learned author in the end agreed with the Court's decision he had initially stated the following:-

> "Under traditional customary law, the delict of seduction is defined as sexual intercourse with a woman, with her consent, but without her guardian's consent. The delict is committed not against the woman, but against her guardian, who, as the wronged party, is entitled to claim damages. The woman is merely an object through whom the delict is committed. Customary law does not recognise a woman's right to claim damages for her seduction. A guardian cannot succeed if he has consented (to) or encouraged the seduction, as such action amounts to collusion. Damages are awarded to

> him for the diminution in the *lobola* value of the girl." (The underlining is mine).

In the circumstances, the following sentiments expressed by DUMBUTSHENA CJ at pp 125H-126A only apply, in my view, under common law:-

> "The action for seduction embraces in our general law two claims; one is for satisfaction for the defloration of the girl and the other for lessening her chances of a successful marriage. The girl seduced is entitled to be compensated for the loss of her virginity, and for her diminished chances of making a suitable marriage. See *Bull v Taylor* 1965 (4) SA 29 (A) at 39."

Indeed the case cited in support of the above sentiments (*Bull v Taylor supra*) was concerned with seduction under common law. In the circumstances the new "age, status and capacity" - *Jenah v Nyemba* 1986 (1) ZLR 138 - of a woman would not bestow on her rights she never possessed. On that basis I would also say the case was wrongly decided.

The Court in the *Katekwe* case *supra* also assumed without, in my view, a full consideration of the matter, that the "disability" or "discrimination" suffered by women under customary law was due to "their perpetual minority". From that position it went on to hold that, on the passing of the Majority Act, once they gained majority all the "disabilities and discrimination" fell away. In this connection DUMBUTSHENA CJ said at pp 124-125:-

> "It seems to me that an African woman with majority status can if she so desires, allow her father to ask for *roora/lobola* from the man who wants to marry her. She and she alone can make that choice. If she does agree to her father asking for *roora* from his future son-in-law before marriage the father can go through the contractual procedures required before an African marriage is effected. The position, as from 10 December 1982, when the Legal Age of Majority Act came into effect, is that an African woman of majority status can contract a marriage, whether that marriage be in terms of the African

> Marriages Act [*Chapter 238*] or the Marriage Act [*Chapter 37*] without the consent of her guardian."

And at p 128:-

> "In my view, the above was the intention of the Legislature and the object the Legislature sought to achieve was the liberation of African women from the legal disadvantages of perpetual minority …".

The above case was followed in *Jenah v Nyemba supra*; and *Chihowa's* case *supra*, a case which was, as is this, concerned with succession problems. And it received to some extent approval in *Murisa N O v Murisa* 1992 (1) ZLR 167 (S).

The question to consider is whether the "disabilities" and "discrimination" suffered by women under customary law were based on "their perpetual minority". In *Mwazozo's* case *supra* I came to the conclusion that they were not based on their perpetual minority but on the nature of African society, especially the patrilineal, matrilineal or bilateral nature of some of them. I reasoned that the concepts of "minority" and "majority" status were not known to African customary law but that they were common law concepts which, in my view, should only be used in customary law situations with great care. And I attempted to explain why allowing female children to inherit in a broadly patrilineal society, such as in the present case, would disrupt the African customary laws of that society. Although my explanations may have been too general, I still consider them broadly correct. In an article by Ncube entitled "Voodoo Law Brewed in an African Pot: Judicial Reconstruction of the Customary Law of Inheritance", published in *Zimbabwe Law Review* Vol 12, 1995 106-110, it was stated that the sentiments I expressed on the

matter were not persuasive because they were not based on "a single legal sociological or anthropological authority". This view was repeated in the submissions made by Mr *Ncube*. Although no "authorities" were cited, the sentiments were based on the Court's knowledge, experience, understanding and appreciation of African customary law (the Court's composition included two Africans). I observe that the submissions which were made by all counsel in this case were, apart from in most cases unnecessarily and unjustifiably partisan, intemperate and, as Mr *Ncube* put it, "trenchant" articles written by academics criticising various cases of this Court, also largely not backed by "authorities".

I agree with what Bennett, *op cit*, says at p 5 about the nature of African society. The learned author states that at the heart of the African socio-political order lay the family, a unit that was extended both vertically and horizontally to encompass a wide range of people who could be called "kin". The family was therefore the focus of social concern. In the circumstances, individual interests were submerged in the common weal and the system stressed individual duties instead of his or her rights. And the legal relationships of most consequence in customary law were those of a family's dealings with other families, not those flowing from one person's relations with another.

At the head of the family there was a patriarch, or a senior man, who exercised control over the property and lives of women and juniors. It is from this that the status of women is derived. The woman's status is therefore basically the same as that of any junior male in the family. Mr *Ncube* conceded that males in a family are as subordinate to the patriarch as females until they are "liberated". The

liberation generally comes with the death of the patriarch and the male "taking over" or with the male moving away from the family and founding his own family. An example of the male's status was demonstrated in a recent criminal case this Court dealt with - *Musikavanhu v S* S-208-98. In that case the appellant, who was married and had a family of his own, was accused of having indecently assaulted one of his nieces. The father of the complainant, a relation, went and reported the matter to the father (patriarch) of the appellant so that the appellant could be disciplined. The father of the appellant and other relatives had to hold a meeting (a dare) where the appellant was forced to answer the allegations and was thereafter reprimanded for his actions. Clearly the appellant, even at his stage in life, was still not liberated. He was, to use the inappropriate term, still "a minor".

In my understanding of African society, especially that of a patrilineal nature, the "perpetual discrimination" against women stems mainly from the fact that women were always regarded as persons who would eventually leave their original family on marriage, after the payment of *roora/lobola*, to join the family of their husbands. It was reasoned that in their new situation - a member of the husband's family - they could not be heads of their original families as they were more likely to subject the interests of the original family to those of their new family. It was therefore reasoned that in their new situation they would not be able to look after the original family. It was also reasoned that the appointment of female heirs would be tantamount to diverting the property of the original family to that of her new family. This would most likely occur on the death of a female heir. Then her property would be inherited by her children who would be members of her new family. This, in my

view, would be a distortion of the principles underlying customary law of succession and inheritance.

Mr *Ncube*, in his submissions, sought to divide succession into two, that is, succession to the name and status of the deceased male within the family and succession to his property. He went on to submit that whilst one person succeeded to the name and status of the deceased, several people, the deceased's children both males and females, would inherit the property.

I do not understand how this submission is supposed to support the main argument he advances in this case. This is because if he now accepts the position that males are properly preferred to inherit in the limited sphere of the name and status of deceased males, it would still bring us back to the question of females being discriminated against in that limited sphere.

As to the question of whether or not the heir also inherited the property of the deceased, the accepted position is, on all the authorities (see the cases already cited above), that the heir inherits the property and responsibilities of the deceased. The term "status", when used in inheritance and succession, includes, as I have already found, property of the deceased. What, I consider, is being confused here is that after the death of the deceased some of his property is distributed to or divided amongst various relatives and acquaintances. This may be done because of the wishes of the deceased, expressed before his death, or because of the heir's desire to discharge his responsibilities of looking after the family. And, in my understanding,

this is always done with the approval and consent of the heir. In the circumstances, this is not inheriting but distribution of property.

On this issue I should say that, whilst I agree with most of the sentiments in the passage cited by Mr *Ncube* in support of his submission, I disagree with the last sentence thereof. The passage reads:-

> "The combination of misconceived versions of custom, judicial ossification and legislative prescriptions have their conjunction in the interpretation of the rôle of heir. The rôle of the heir was primarily one of assuming the status of the deceased while the property of the deceased was distributed more widely. It would appear that at customary law, prior to its 'construction' by the courts, the rôle of the 'heir' was to guide the family, care for the needs of minor children in conjunction with the widow as well as seeing to her needs. Instead the courts translated it into an all powerful patriarchy who inherited all the property of the deceased and could do with it as he chose …". (The underlining is mine).

See Dengu-Zvobgo *et al* "*Inheritance in Zimbabwe; Law, Customs and Practices* WLSA, Harare, 1994 at p 260. The first sentences of the above passage, in my view, correctly describe the rôle of the heir and also correctly state, as I have stated above, that the property gets "distributed" in pursuance of the heir's responsibility.

What I disagree with is that the courts have departed from the above view of the rôle of an heir. Earlier on in this judgment I indicated that the heir assumes the responsibilities of the deceased, which responsibilities include those indicated in the above article. In *Chihowa's* case *supra* DUMBUTSHENA CJ said at pp 231H-232D:-

> "In *Masango v Masango* S-66-86 (unreported), this Court considered the responsibility falling on the eldest surviving son of the deceased, the intestate heir of his father's estate, to maintain and support the customary law junior

wife of his deceased father and her three children. The heir had refused to support his late father's third wife. BECK JA, as he then was, said at 3:

> 'In the absence of making it possible for the appellant to find such alternative accommodation for herself and the children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning an avoidance by the respondent of his customary law obligation to care for his father's wife and children.'

See also *Matambo v Matambo* 1969 (2) RLR 154 (AD) at 155F; 1969 (3) SA 717 (R AD) at 717G.

In *Masango's* case *supra*, the eldest son was heir to his father's estate and in the instant case it is the eldest daughter who was appointed intestate heiress. What the two share in common is the responsibility to administer their respective estates for the benefit of their father's dependants according to African custom and usage. …"

Clearly the courts have always maintained the proper position on this issue and "an all powerful patriarchy who inherited all the property of the deceased and could do with it as he chose" would never receive the sanction of the courts.

From the above it is clear that, in my view, the discrimination against women was not because of their "minority" but mainly because of the consideration in African society which, amongst other factors, was to the effect that women were not able to look after their original family because of their commitment to the new family. In the circumstances, I consider that *Katekwe's* case *supra*, *Chihowa's* case *supra*, and those cases which followed them were decided wrongly in that respect. They defined the provisions of the Majority Act too widely.

I am also of the view that the finding in *Katekwe's* case *supra*, *Chihowa's* case *supra* and other cases which followed them is tantamount to

bestowing on women rights which they never had under customary law. A woman, as is gathered from the above, had no rights under customary law to heirship, demanding payment of *lobola* (it never depended on her acceptance), or to contract a marriage under the Customary Marriages Act [*Chapter 5:07*] without the consent of her guardian and others. In this connection see Bennett in his *Human Rights* book *supra* at pp 93-94, where the learned author discussed an Age of Majority Act passed in Natal and Kwazulu which is similar to our Majority Act. He said:-

> "If the Age of Majority Act is applied to African women, our courts would be advised to avoid the course taken by the Zimbabwe Supreme Court. With the specific aim of empowering women, conditions there for recognition of customary law were amended to allow the Legal Age of Majority Act to apply to persons subject to customary law. When this reform came to be implemented in *Katekwe v Muchabaiwa* (*supra*), however, the Supreme Court went much further than simply allowing major women *locus standi*. DUMBUTSHENA CJ found that when a woman attained the age of eighteen years she was completely emancipated; in consequence she no longer required a guardian to assist her in pursuing legal rights or incurring obligations. As a result the CHIEF JUSTICE held that a father lost his right to sue for damages for the seduction of his major daughter since the right had passed to the woman.
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> DUMBUTSHENA CJ went even further to say (although this was an *obiter dictum*) that, in view of the Legal Age of Majority Act, a father no longer had an independent legal entitlement to demand bridewealth (*lobola/roora*) when his daughter married. If women gained full contractual powers when they turned eighteen, they could contract marriages without the consent of their guardians. It followed that a father's consent was irrelevant to the marriage and that he could not insist on bridewealth, the seal of a valid union (under customary law).
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> Arguably this case was wrongly decided. Majority status gives women powers (or competencies) that they formerly lacked. It does not necessarily give them additional rights. Women subject to customary law never had the right to sue for damages for their own seduction (the delict was conceived to be in the interest of their guardians) nor did they have a right to claim bridewealth for their own marriages. The fact that a woman's capacity is governed by common law does not mean that her substantive rights should be determined by the same system." (The underlining is mine).

As I have already indicated, under customary law women did not have the right to heirship and majority status would not give them that additional right.

In the result, I consider that the above consideration also shows that the said cases were wrongly decided.

On the intention of the Legislature in passing the Majority Act, my view is that although it wanted to emancipate women by giving them *locus standi* and "competencies" in all matters generally, especially under common law, it was never contemplated that the courts would interpret the Majority Act so widely that it would give women additional rights which interfered with and distorted some aspects of customary law. As already indicated above, matter such as "marriage, divorce, burial, devolution of property on death or other matters of personal law", and customary law in general, were specifically exempted from the provisions of the Constitution forbidding discrimination - s 23(3) (a) and (b) of the Constitution. It was therefore not expected that any interpretation of the Majority Act would interfere with these. That the Legislature considered the Court's interpretation of the Majority Act as being too wide and out of its contemplation was shown by the widespread calls in and out of Parliament for the Majority Act to be amended so as to reflect its true wishes. In this connection see Ncube's Critique on *Katekwe v Muchabaiwa supra* at pp 217-219. In that article the learned author says at p 217:-

> "… The Prime Minister (now the President of Zimbabwe) replied that 'if there has been a flaw in drafting the regulation (the Majority Act) that flaw will be amended'. He added, apparently in a moment of jest, that if his sister were to get married, he would demand *lobola* and if the intended husband pointed to the *Katekwe* judgment, he would say to him: 'OK that is the judgment. Do you want to marry my sister or not?'. (*Hansard*, 12 September 1984)."

The various Ministers involved in the drafting of the legislation promised to look at the Majority Act and make changes if necessary. However, the important words were that changes would be made "if there had been a flaw in drafting". My view is that there was no flaw in the drafting and that it was the Court which wrongly interpreted the Majority Act too widely. There was, therefore, in my view, no need to amend the Majority Act.

Mr *Ncube* and Ms *Makarau* both urged this Court to, in any event, exercise its discretional law-making rôle to ensure that women are not excluded from being appointed heiresses at customary law. This, they submitted, would be achieved by supporting in full the decisions in the *Katekwe* and *Chihowa* cases *supra*. They argued that this was necessary because the system of appointing single male heirs had caused untold hardship to the deceased's widows and dependants in that the heirs have too often not lived up to their responsibilities and used all the deceased's property for their own personal benefit. They also argued that the change would be proper because culture and custom are dynamic and change with changes in society and in particular the fact that urbanisation has made African society less and less patriarchal. It was further argued that the change would be in keeping with the principle of advancing gender equality enshrined in the international human rights instruments to which Zimbabwe is a party.

Whilst I am in total agreement with the submission that there is a need to advance gender equality in all spheres of society, I am of the view that great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African

people conducted their lives and the majority of Africans in Zimbabwe still live in rural areas and still conduct their lives in terms of customary law. In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege. On this aspect see Ncube's Critique on *Katekwe v Muchabaiwa op cit* at pp 217-219, and Ncube's "Customary Law Courts" published in *Zimbabwe Law Review* Vols 7-8 1989-1990 at p 15, on the hostile reaction received by the Court's decision on the Majority Act.

Secondly, the application of customary law generally is sanctioned by the Constitution and some would elevate this to a right having been conferred by the Constitution.

Thirdly, the application of customary law, especially in inheritance and succession, is in a way voluntary, that is to Africans married under customary law or those who choose to be bound by it. It could therefore be argued that there should be no or little interference with a person's choice. This aspect of choice was stated in *Mujawo v Chogugudza* 1992 (2) ZLR 321, where it was held that when an African contracts a marriage according to African law and custom s 69(1) (now s 68(1)) of the Act lays down that customary law will apply to the administration of the estate of the African. And that, on the other hand, the general law will apply to marriages under the Marriages Act [*Chapter 5:11*].

In view of the above, I consider it prudent to pursue a pragmatic and gradual change which would win long term acceptance rather than legal revolution initiated by the courts.

Further, I do not consider that the Court has the capacity to make new law in a complex matter such as inheritance and succession. In my view, all the courts can do is to uphold the actual and true intention and purport of African customary law of succession against abuse, as was done in the *Masango* case, *supra*. See also Bennett *op chit* at p 6, where the learned author states:-

> 'The obligation to care for family members, which lies at the heart of the African social system, is a vital and fundamental value, which Africa's Charter on Human and People's Rights is careful to stress. Paragraph 4 of the Preamble to the Charter urges parties to pay heed to 'the virtues of (the African) historical tradition and the values of African civilisation', and Ch 2 provides an inventory of the duties that individuals owe their families and society. Article 29(1), in particular, states that each person is obliged to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need."

Matters of reform should be left to the Legislature. In this connection see Bennett *op cit.* at pp 94-95 where the learned author commented on the South African scene as follows:-

> "Comparison of a woman's lack of rights in matters of guardianship and succession gives a clearer indication of the scope of judicial review under the Constitution (there is no such review under the Constitution of Zimbabwe). The customary rules governing parental rights to children are flexible and the courts have already decided that in custody orders the interests of the children must come first. The indeterminate nature of customary law, and the fact that reform has already begun, are reasons to continue the process by applying a norm of non-discrimination to mothers who claim rights to their children.
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> To abolish the principle of agnatic succession is a different matter. Customary rules of succession are firmly established and no attempts have yet been made to change them (see below for the Zimbabwe situation). Even more to the point is the court's capacity to make new law. In the case of guardianship a court has only to declare that a mother has the same right as the father. In the case of succession a court could not simply rule customary norms void; it would have to stipulate how much widows could inherit and in what circumstances. Details of this nature cannot be determined in judicial proceedings. The proper medium for reform would be legislation, which permits full investigation of the social context and consultation with interested groups." (The underlining is mine).

And indeed our Legislature, after what I understand was wide consultation with interested groups, has undertaken the reform of succession in estates of persons subject to customary law. In s 3 of the Administration of Estates Amendment Act 1997 ("the amendment") it repealed the said s 68 of the Act. The amendment went into detailed provisions about all matters of concern in succession. Those details could never have been undertaken during judicial proceedings. The impression that these provisions are acceptable to most of the persons concerned is given by the fact that there was wide consultation before the promulgation of the amendment and there has so far been no outcry about the provisions.

In the circumstances, if the deceased in this case had died on or after 1 November 1997 his estate would have been administered in terms of the amended s 68 of the Act. So as far as succession under customary law is concerned the law has now been reformed.

Ms *Makarau* made submissions to the Court about what she considered were the peculiar circumstances of this case. These were to the effect that the respondent, as the child of the deceased's second wife, was unlikely to look after the deceased's first wife and her child (the appellant). It was also submitted that because an heir under customary law inherited "any immovable property or any rights attaching thereto forming part of the estate of such deceased person" in his individual capacity, the respondent would evict the deceased's first wife and the appellant from the said house to do with it as he pleased. This, she submitted, would work a hardship on both the first wife and the appellant because the said house was acquired by the deceased and the first wife without the participation of the second wife and

because when the deceased died he was living in the said house with the first wife and both were being looked after by the appellant. If this was the position - some of the matters were partly challenged by the respondent and his witnesses - it would be the same as that which obtained in the *Matambo* case *supra*. In my view, it would be resolved in the same way as the *Matambo* case *supra* if the matter were to be brought before the courts.

I should state that the Court would like to express its appreciation for the thorough, well-researched and helpful submissions made by the three counsel in this matter. As the issues raised in this case were of importance not only to the parties but also to the clarification of the law on succession it would be an injustice to saddle either party with costs. I consider that there should therefore be no order as to costs.

In the result, the appeal is dismissed. There will be no order as to costs .

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

McNALLY JA: The central point made by MUCHECHETERE JA, which compels me to accept the weight of his reasoning, is that the Legal Age of Majority Act, now *Chapter 8:07*, removed disabilities but was not intended (except for the reduction in age from twenty-one to eighteen) to create positive new rights. Thus a woman of eighteen years of age in the communal area who wished to marry without her father's consent might do so, under the Marriage Act. But she could not do so under the provisions of customary law. She could not, as it were, accept and reject customary law at the same time.

Similarly, where by statute it was provided that immovable property, in a deceased estate to which customary law applied, passed to the heir in his individual capacity and not as a representative of his family (s 7 of the African Wills Act [*Chapter 240*], later s 6A of the Customary Law and Primary Courts Act No. 6 of 1981, later s 7 of the Customary law (Application) Act [*Chapter 8:05*], finally repealed with effect from 1 November 1997 by Act 6/97), the Courts did not treat that

enactment as a repeal of the heir's duty to maintain the dependants of the deceased. This was made very clear by BECK JA in the passage cited by my brother MUCHECHETERE, in his main judgment above, from *Masango v Masango* S-66-86 (unreported). The statutory amendment had to co-exist with customary law. It did not replace it. So the majority status of women had to co-exist with customary law. It did not replace it. If no suitable male heir were available, a woman could lawfully be appointed heir. But the customary law preference for a male heir was not eliminated.

Happily, these conflicts have now been resolved by the new Part IIIA of the Administration of Estates Act, introduced by Act 6/97. If there are problems in future, the Act will provide a fresh starting point for their solution.

I respectfully agree with the main judgment.

Makarau & Gowora, appellant's legal practitioners

Pro deo, for the respondent